JAMES B. LOONAN
ELIZABETH K. LOONAN

IBLA 84-2 Decided September 17, 1984

Appeal from decision of Montrose District Office, Colorado, Bureau of Land Management, offering grant of road right-of-way. C-35399.

Affirmed in part; set aside in part and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Conditions and Limitations

   In granting a right-of-way for access over an existing road pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), BLM may not unreasonably burden the right-of-way by requiring upgrading of the road where upgrading is neither commensurate with the holder's intended use of the road nor designed to protect any other resource value which might be adversely affected by such use.

APPEARANCES: James B. Loonan, pro se, and for Elizabeth K. Loonan.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

James B. and Elizabeth K. Loonan have appealed from a decision of the Montrose District Office, Colorado, Bureau of Land Management (BLM), dated August 22, 1983, offering the grant of a road right-of-way, C-35399.

On August 3, 1982, appellants filed an application with BLM for a right-of-way for the "non-exclusive use of the existing road to our property across BLM land." Appellants stated that, although they have used and would continue to use the road infrequently for recreational purposes, they need the right-of-way in order to obtain clear title to their property. 1/ Appellants further stated: "We intend to use the road as it is now." Appellants noted that there were two alternative access routes over BLM and private land, but concluded that these routes are not practical.

1/ Appellants' property is situated in the SE 1/4 sec. 25, T. 48 N., R. 10 W., New Mexico Principal Meridian, Montrose County, Colorado.

On May 18, 1983, BLM prepared a "Land Report and Decision Record" (Land Report), which assessed the road right-of-way requested by appellants, as well as several alternatives, including a no-action alternative. Alternative No. 1 was to grant the requested right-of-way over "road A." Road A is 2.2 miles long and 14 feet wide and crosses public land. BLM stated that the right-of-way would be for casual use only and no maintenance or improvement of the road would be necessary "as long as resource damage is not occurring." Id. at 1. Alternative No. 2 was to grant the requested right-of-way "subject to upgrading the road to meet future access needs." Id. Upgrading would consist of placing drainage structures, widening, ditching, and water barring. Alternative No. 3, the preferred alternative, was to grant a 60-foot wide right-of-way over existing "road B." Road B crosses public and private land, the latter of which is owned by Richard Cook and partially subdivided into 35-acre parcels. We note that road B is part of "Alternative No. 1," a route considered and rejected by appellants in their right-of-way application. In order to provide all-weather access, this road would be upgraded by ditching, grading, and water barring. Alternative No. 4 was to grant a right-of-way over existing "road C." Road C crosses public and private land. The road would be upgraded by placing drainage structures, grading, ditching, and water barring. In the case of alternatives Nos. 2, 3, and 4, gravel surfacing would be required only if appellants "began using the road continuously year-round." Id. at 1, 2. Alternative No. 5 was the no-action alternative.

The Land Report recommended adoption of alternative No. 3, i.e., the grant of a right-of-way over road B conditioned on appellants "securing an easement across the adjacent Cook subdivision." Id. at 6. BLM concluded as follows:

> Route B is the most feasible, cost-effective route for providing dependable year-round access to the applicants' property. Land use trends in the area indicate that the applicants' property will need all weather access in the future. Granting the applicants a R/W over Road A for casual use would be a short-term solution to the probable long-term access needs for the area. We could expect additional R/W's from owners of lots to the south of his property.
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> Special Stipulations to be attached to the grant will assure that environmental impacts are kept within the acceptable range. The 60 feet R/W width was specified in order to make it easier to potentially have the road dedicated to the County.

In its August 1983 decision, BLM offered to grant appellants a 60-foot wide, 3,250-foot long right-of-way over road B pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1982). BLM required appellants to execute the right-of-way grant, thereby agreeing to its terms, conditions, and stipulations. In addition, BLM required appellants to provide a copy of their authorization "to construct and use the road over the private land in Sec. 35, T. 48 N.,

R. 10 W.," prior to BLM's execution of the grant. 2/ BLM also noted that the right-of-way holder is required under 43 CFR 2803.1-2 to pay annually in advance the fair market value of the right-of-way. BLM required appellants to submit a deposit in order to insure payment of the first year's rental. If no deposit was submitted within 30 days of receipt of the decision, action on the case would be suspended "pending formal appraisal." If the deposit was submitted and the right-of-way granted, an appraisal would then be made. BLM concluded that appellants had 30 days from receipt of the decision either to "accept, execute and return the right-of-way grant, or to appeal."

On September 22, 1983, appellants filed a notice of appeal from the August 1983 BLM decision. In their statement of reasons for appeal, appellants apparently do not contest the selection of alternative No. 3, i.e., road B, by BLM. However, appellants argue that they should not be required to construct a road, especially as they originally sought an existing road "as it is" and in view of the fact that road B on either side of the public land which it crosses to reach appellants' property, is "no more than a jeep road." Appellants state that they would prefer not to execute the right-of-way grant until BLM has made an estimate of the fair market value of the right-of-way. Appellants also offer a reciprocal easement across their property to BLM in return for the BLM right-of-way, pursuant to 43 CFR 2801.1-2. Finally, appellants assert that they have been unable to obtain a private right-of-way from Cook due to unwillingness on Cook's part and request that the BLM right-of-way grant be stayed pending receipt of the private right-of-way.

[1] Section 504(c) of FLPMA, 43 U.S.C. § 1764(c) (1982), provides in relevant part that a right-of-way shall "be subject to such terms and conditions as the Secretary * * * may prescribe regarding * * * construction [and] maintenance." The imposition of terms and conditions is circumscribed by the well-established rule that such terms and conditions must not be inconsistent with nor tend to unreasonably burden the proposed right-of-way. Eugene V. Vogel, 65 IBLA 213 (1982).

In the present case, the proposed right-of-way grant provides that the holder is "authorized to construct, operate, maintain and terminate a(n) access road on the above-described public land." Moreover, the grant provides that "[t]he holder shall comply with the stipulations attached hereto as Exhibit A and made a part hereof." The special stipulations attached to the proposed right-of-way grant provide, in relevant part:

2/ BLM also stated that under 43 CFR 2803.1-1(b) a right-of-way holder was required to reimburse the United States for the costs incurred in monitoring the construction, operation, maintenance, and termination of the authorized facilities on a right-of-way and that this fee was "payable at this time." However, 43 CFR 2803.1-1(b) provides that the right-of-way holder has 60 days following "issuance" of the right-of-way within which to submit the monitoring fee. Accordingly, appellants are only liable for this fee if the right-of-way is ultimately issued to them.

2. The holder is responsible for preventive and corrective road maintenance during the term of the grant. This may include blading the roadway, cleaning ditches and drainage facilities, dust abatement, surfacing, or other requirements as directed by the authorized officer.

3. The road shall be constructed and maintained to the standards outlined on the "Typical Road Cross Section Diagram" which is attached hereto.

4. When construction is completed, the holder shall rehabilitate all disturbed areas outside the ditchlines as directed by and to the satisfaction of the authorized officer.

Appellants, however, object to the requirement that they construct a road, especially as they apparently believe that their use would be consistent with the present condition of the road. The record does not indicate that the present condition of the road is inadequate for appellants' intended use. Rather, construction of the road is being required merely in anticipation of the "probable long-term access needs for the area." Land Report at 6. These access needs presumably encompass appellants as well as other potential users of the road. In effect, appellants are being required to upgrade a road for the potential benefit of not only themselves, but other members of the public. In addition, there is no evidence that appellants' intended use of the road in its present condition would adversely affect any other resource value which would be protected by upgrading the road. We conclude that where a stipulation in a proposed right-of-way grant is neither commensurate with the holder's intended use of the land covered by the grant nor designed to protect any other resource value which might be adversely affected by such use, the stipulation must be held to unreasonably burden the right-of-way. This is the situation herein. We conclude that the construction requirement in appellants' proposed right-of-way grant unreasonably burdens that right-of-way. Eugene V. Vogel, supra.

It is, of course, true that appellants may at some time seek to deviate from their intended use of the road, which at present is infrequent recreational use, and, in fact, may in the future require all-weather access to their property. This change in circumstances may well necessitate an upgrading of the road for, at the very least, appellants' benefit. Accordingly, BLM could properly include a stipulation in appellants' right-of-way grant to the effect that if appellants' use of the road becomes such that it is inconsistent with the then current condition of the road or such that upgrading of the road is necessary to protect some resource value, then appellants will be required to upgrade the road according to the directions of an authorized officer, commensurate with the need. We note that special stipulation No. 6 already specifically provides that: "If the authorized officer determines that through the holder's actions the use of the road warrants upgrading, the upgrading will be the responsibility of the holder."

Appellants have also requested that they be given additional time to negotiate acquisition of a right-of-way with respect to the neighboring

private property. This would be appropriate. However, in view of the difficulty appellants have had in obtaining that right-of-way and the inappropriateness of the construction requirement as to road B, we believe that on remand BLM should, in the alternative, reconsider granting appellants a right-of-way over road A, their preferred route, in its present condition, in the absence of adverse land management considerations. 3/ In addition, BLM could require a similar stipulation to the one outlined above with respect to upgrading of the road where necessary. This alternative would, of course, avoid the necessity of obtaining a private right-of-way in order to assure access.

Appellants have also stated that they prefer to have an appraisal or estimate of the fair market value of their right-of-way prior to accepting any grant. However, the standard procedure, in view of the time and expense necessary to prepare an appraisal, is to grant a right-of-way subject to a subsequent appraisal. See, e.g., Big Horn Canal Association, 76 IBLA 283 (1983). We see no reason to depart from this procedure in the present case where it expedites the processing of the grant and assures BLM of the willingness of the applicant to accept the grant prior to the expense of an appraisal. Appellants, of course, have the right to appeal from any adverse decision as to fair market value or to relinquish the right-of-way. 4/

Accordingly, we conclude that the appropriate course of action is to set aside the August 1983 BLM decision with respect to the construction requirement and to remand the case to BLM to consider either granting a right-of-way over road B subject to appropriate stipulations, with additional time to obtain a private right-of-way, or granting a right-of-way over road A subject to appropriate stipulations.

3/ We fail to see why BLM would have a problem with this alternative, as long as appellants maintain their casual use of the route. We note the following discussion in the Land Report at page 3:

"Granting the R/W as requested should not result in any additional environmental consequences beyond those presently occurring. The Loonans presently use the road on a casual basis. The R/W grant would allow for casual use only.

"This alternative may result in future administrative and compliance problems for the BLM. If the Loonans' subdivide the land or build a permanent home on it, the R/W grant would have to be revised to reflect higher road maintenance standards than are needed for casual use.

"Additionally, the most appropriate route for permanent year-round access may not be the same as the route chosen for casual use."

4/ Appellants have also offered a reciprocal grant of a right-of-way across their property pursuant to 43 CFR 2801.1-2. The regulation provides that BLM may, as a condition to granting a right-of-way, require an applicant to grant the United States an equivalent right-of-way. While such a grant would not alter the terms and conditions of the BLM right-of-way grant, it would alter the fair market value of that right-of-way. 43 CFR 2803.1-2(c)(4). Whether a reciprocal grant is appropriate in this case is a matter to be considered by BLM.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside in part and the case is remanded to BLM for further action consistent herewith.

Gail M. Frazier
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Edward W. Stuebing
Administrative Judge.